Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of JOHN PATRICK FAY, also known as JOHN P. FAY, *Deceased*,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF

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Statement

Appellant's jurisdictional statement, docketed April 27, 1978, and her reply brief, docketed May 31, 1978, are pending. This Court decided *Lalli* v. *Lalli* (No. 77-1115) on December 11, 1978. *Lalli*, as a new case, is an intervening matter which was not available to appellant.

In counsel's view, the determinative dissimilarities between *Lalli* and this appeal in important constitutional respects could not have been previously articulated with propriety while *Lalli* was pending before this Court. In conformance with Rule 16, par. 5 of this Court's rules, appellant files this supplemental brief to effectuate what could not have been done previously.

In this supplemental brief counsel differentiate, in substance, the facts of this appeal from those in *Lalli* and are of the considered opinion that neither the holding nor the rationale of *Lalli* along constitutional lines in an intestate succession matter have any application here.

I

The statutory out-of-state joint acknowledgment of paternity here satisfies the state's interests in the accurate and orderly settlement of estates

In *Lalli*, all significant contacts were with New York local law: the child, his mother, and the decedent, his father, were New York residents at his birth in 1948, and at her death in 1968. Child and father continued to be New York residents until the father's death in 1974.

Here, in *Fay*, the decedent was the illegitimate. He was born in Scotland, where his parents then resided, in 1892. His father died in 1915, his mother in 1932: neither parent ever came to New York. Decedent established a New York domicile after their deaths which he maintained until his demise in 1970.

The birth certificate of Fay, the decedent illegitimate, was executed in precise compliance with the Scottish statutorily-prescribed procedures for the acknowledgment of paternity of an illegitimate (Jurisdictional Statement, pp. 4-5, 8). The birth certificate is a contemporaneous

public record of a joint voluntary acknowledgment and recognition of paternity on the part of Fay's father and mother, who, in their own handwritings, designated themselves as "Father" and "Mother" and signed their names, witnessed by the Scots civil registrar (Jurisdictional Statement, Appendix F): the original record as of the day of this appeal was then and still is believed to be lodged with the Scots civil registrar. *This imperishable document of decedent's birth and paternity is the cornerstone of appellees' case.* Their grandmother's joint acknowledgment of her son's maternity secured their right to inherit from him. We perceive no reason why their grandmother's attestation as to her son's paternity should not bind appellees and secure appellant's right to inherit from him.

In summary, the Scottish appellate judge in *Alexander* v. *Alexander*, [1920] S.C. 327 at 331-332 is paraphrased to say for appellant on this appeal: it seems to us that this was a complete recognition by Fay's father of his paternity. If he had believed that decedent was not his own but that of another man, it is not conceivable that he should have taken for its registered name his own name. We cannot regard what was then done as being anything other than a solemn declaration by Fay's father that the decedent was his child.

A

New York's interests will not be jeopardized by accepting Fay's out-of-state birth record as evidence of the formal acknowledgment of paternity by his father and mother.

The *Trimble* holding

> . . . goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity (*Trimble*, 430 U.S., at 772 n.14).

The *Lalli* plurality reiterated *Trimble's* holding that there was no restriction on a State's freedom to require proof of paternity by means other than a judicial decree, saying

> Thus a State may prescribe any *formal* method of proof, whether it be similar to that provided by § 4-1.2 or some other regularized procedure that would assure the authenticity of the acknowledgment. As we noted in *Trimble*, 430 U.S., at 772 n.14, such a procedure would be sufficient to satisfy the State's interests (*Lalli*, Slip op., at 12 n.8; emphasis in original).

In *Lalli*, Mr. Justice Powell explained *Trimble's* "formal acknowledgment" to mean ". . . such as would minimize post-death litigation, i.e., a regularly prescribed, legally recognized method of acknowledging paternity" (*Lalli*, Slip op., at 15 n.11).

Acceptance by this Court of foreign formal acknowledgments of paternity as alternatives to judicial orders of filiation is, at the least, recognition of state extrajudicial formal paternity acknowledgment procedures giving cognizance to the 20 states which, by legislative enactments, now subscribe to such procedures, but not with unanimity as to the evidentiary criteria to establish a formal acknowledgment. In all events, the criteria set up by Mr. Justice Powell in *Lalli* (Slip op., at 15 n.11) were fully met by decedent's parents in their precise compliance with the provisions of the Scottish legislative act.

Extrajudicial forms of formal paternity acknowledgment have been accepted by New York courts (*Matter of Ortiz*, 86 Misc. 2d 790; *Matter of Sherman*, 76 Misc. 2d 551; *Matter of Ortiz*, 60 Misc. 2d 756; *Matter of Slater*, 195 Misc. 713) as a matter of comity (*Ortiz, supra*, 60 Misc. 2d at 762).

We note that the Bennett Commission did recommend to the New York Legislature that nothing less than a judicial order of filiation made in foreign jurisdictions be recognized as valid in New York to establish paternity (Jurisdictional Statement, Appendix G-2, G-6). The Legislature did not adopt the recommendation.

Professor Samuel Hoffmann, the "chief architect of the EPTL" (17B McKinney, Estates, Powers and Trusts Law, 1-1.1 to 5-4.5, at page IV), who prepared the practice commentary to 4-1.2, did not view 4-1.2 as requiring a judicial order of filiation for an illegitimate, born out-of-state, to inherit in New York (*op. cit.*, at p. 534). He and the Commission (Jurisdictional Statement, Appendix G-4, G-6), were addressing themselves to local orders of filiation for illegitimates and not to foreign acknowledgments. It would, at the least, be anomalous if the Legislature's intention were to be inferred from the general language of an Act to give it extraterritorial effect (*Ewens* v. *Thompson*, 208 N. Y. 245 at 247).

Since the illegitimate here is the decedent, it is not relevant to discuss particular procedural problems or possible spurious claims in areas where the illegitimate is other than the decedent.

In our view, and we are committed to the proposition, there is now a constitutional rule which has emanated from this Court requiring New York, in a case of this type, to accept an out-of-state *formal* acknowledgment of paternity as an alternative to a judicial order of filiation in proof of paternity.

Fay's Scottish birth certificate, jointly executed by his parents for the purpose of recording his birth and proving biological paternity in precise legal conformity to legislative prescription, satisfies the primary state goal to provide for the just, accurate and orderly disposition of the decedent illegitimate Fay's intestate property.

B

New York, Fay's domicile at death, governs the distribution of his intestate personal estate (EPTL 3-5.1, subd. b, par. 2; *Matter of McGlone*, 284 N.Y. 527, affd. sub nom. *Irving Trust Co.* v. *Day*, 314 U.S. 556; *Matter of Gifford*, 279 N.Y. 470).

The evidentiary fact that appellant had to and did establish was her brother Fay's paternity according to the Scottish statute, and nothing more (*Olmsted* v. *Olmsted*, 190 N.Y. 458, affd. 216 U.S. 386; *Miller* v. *Miller*, 91 N.Y. 315; *Matter of Ortiz*, 60 Misc. 2d 756, 763).

The right to inherit at Fay's domicile of origin is not a predicate to his appellant-sister's right to inherit at her brother's domicile of intestate distribution (*Lalli* v. *Lalli*, Slip op., at 7; *Matter of Lalli*, 43 N.Y. 2d at 68 and n.2). Had the *Labine* child been governed by 4-1.2, she would have been a distributee of her father's estate. See, 2 Restatement of Confl. of Laws 2d, § 288, comment (d), p. 262.

II

The state court has imposed an arbitrary and unconstitutional precondition for inheritance from an illegitimate by paternal kindred in contravention of state policy by an unconstitutional assumption of legislative power to speak and act for the state legislature's silence on the subject of recognition of foreign statutory acknowledgments of paternity

A

New York State policy is "to alleviate the plight of the illegitimate child" (*Lalli*, Slip op., at 10).

The New York Legislature desired to "grant to illegitimates *in so far as practicable* rights of inheritance on

a par with those enjoyed by legitimate children" (*Lalli*, Slip op., at 14; emphasis added by the Court).

B

The *Lalli* State Court understood *Labine* (*Labine* v. *Vincent*, 401 U.S. 532) to require the State to show no more than that "there is a rational basis for *the means chosen by the Legislature* for the accomplishment of a permissible State objective" (*Matter of Lalli*, 38 N.Y. 2d at 81; emphasis added).

In the *Fay* fact pattern, no means were chosen by the Legislature for the establishment of the evidentiary fact of paternity, where inheritance *from* the decedent illegitimate was claimed by maternal and paternal kindred (EPTL 4-1.2[b]).

Moreover, the Legislature rejected the Bennett Commission recommendation that recognition be given to foreign acknowledgments of paternity only if they took the form of judicial orders of filiation (*supra*, p. 5).

Nevertheless, the State Court of Appeals assumed:

> . . . if in the absence of an order of filiation an illegitimate child may constitutionally be precluded from inheriting from his father, it is beyond reproach to preclude, in the absence of a filiation order, inheritance by the paternal kindred of an illegitimate (*Matter of Fay*, 44 N.Y. 2d at 144).

This assumption led the State Court to hold that "the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection (*Fay*, *supra*, at 144).

The conclusion of the State Court is non-syllogistic because the decedent is the illegitimate and his out-of-

state paternity has been authenticated in a manner mandated by foreign legislative enactment. The State Court's conclusion conflicts with State policy and is an unconstitutional encroachment on the State Legislature's statutory preserve to enact laws for the regulation of intestate succession. It is not the function of the highest state court "to hypothesize independently" and to implant, solely by its fiat, the requirement of a judicial order of filiation as a prerequisite to recognition of a foreign formal acknowledgment, into the statutory scheme formulated by the New York Legislature (*Lalli*, Slip op., at 14; *Matthews* v. *Lucas*, 427 U.S., at 515; Jurisdictional Statement, at 15). Judicial preferment may not ignore legislative rejection.

The State Court here has not at all considered that a foreign formal acknowledgment of paternity would in any way compromise the State's interests in the orderly settlement of a decedent illegitimate's intestate estate. The State Court's judicial imposition of a requirement of an order of filiation as the *exclusive* means of establishing paternity where the decedent illegitimate's paternity has been formalized and authenticated in a foreign forum in strict compliance with its legislative mandate, an alternative form of paternity proof acceptable to this Court (*Trimble*, 430 U.S., at 772 n.14; *Lalli*, Slip op., at 12 n.8 and 14-15 n.11), does not pass constitutional muster (*Zablocki* v. *Redhail*, 434 U.S. 396, 400-401 [Powell, J. concurring]; *Oregon* v. *Hass*, 420 U.S. 714, 719).

The discrimination against illegitimates remains apparent and is, indeed, enlarged on by the State's highest court. In the facts of this case, there is no deference due to a state court where the means it has selected preempts the acceptance of a "carefully tuned," constitutionally-sanction alternative. *In sum, the effect of applying a statute enacted by the State Court to this situation denies claimant-appellant her inheritance not because her brother's paternity is questionable but simply because he was born out of wedlock.*

III

EPTL 4-1.2, as applied to appellant in the facts and circumstances of this appeal, unconstitutionally discriminates against her on the basis of sex and inequality of treatment

The issues of unconstitutional sex-based discrimination and unequal treatment of persons similarly-circumstanced in the state intestate distribution statute were raised in and considered by the state courts and now are properly before this Court for determination.

The challenge to EPTL 4-1.2, premised on unconstitutional sex-based discrimination and inequality of treatment, is fully detailed and comprehensively briefed in appellant's jurisdictional statement, in subsection (c) entitled "Unconstitutional Unequal Application of EPTL 4-1.2(b)," at pp. 16-24, and is enlarged upon in further argument throughout appellant's reply brief.

Counsel rest their challenge to unconstitutional sex-based discrimination and inequality of treatment on the arguments found therein.

To prevent "unnecessary injustice" (*Lalli*, Slip op., at 14), to give "authoritative guidelines to the courts and legislatures of the several states" (*Lalli*, Stewart, J., concurring), to obviate the need for statute-by-statute determination of validity by this Court (*Lalli*, Blackmun, J., concurring), and to demonstrate that there has been no "retreat" from *Trimble* (*Lalli*, Brennan, J., dissenting), the Court is respectfully requested to accept this appeal and to grant a plenary hearing.

Conclusion

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Dated: December 29, 1978.

Respectfully submitted,

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